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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation, and WILLIAM H. WILLSON, an individual,

Petitioners,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation, ALAN LEVAN, an individual, JOHN D. and DEBRA A. PURCELL, as Class Representatives, WILLIAM A. and ELSE M. SMITH, as Class Representatives, and TIMOTHY J. CHELLING, as Class Representative,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

SUSAN BUCKLEY
ANNE B. CARROLL
CAHILL GORDON & REINDEL
New York, New York

RAYMOND V. MILLER
KAUFMAN MILLER DICKSTEIN
& GRUNSPAN, P.A.
Miami, Florida

ALAN N. BRAVERMAN
STEPHANIE S. ABRUTYN
AMERICAN BROADCASTING COS., INC.
New York, New York

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record
for Petitioners

QUESTIONS PRESENTED

1. When parties who have agreed upon settlement of an action that has resulted in a judgment entered on a jury verdict seek vacatur of the judgment pursuant to their settlement agreement, may a third party who could use the judgment to collaterally estop an action brought by the defendant against whom it was entered intervene as of right under Federal Rule of Civil Procedure 24(a) to oppose the vacatur on the basis of the principles articulated in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994)?

2. May a district court judgment be vacated, consistently with *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), when no new factual or legal developments have occurred after entry of judgment except the agreement of the parties to settle the case?

PARTIES BELOW

The underlying litigation involves three consolidated securities fraud class actions. The named plaintiff-class representatives in each of the three actions are, respectively, John D. and Debra A. Purcell, William A. and Else M. Smith, and Timothy J. Chelling. BankAtlantic Financial Corporation and Alan B. Levan are defendants in all three actions. The parties below also included the following corporations which are wholly-owned subsidiaries of defendant BankAtlantic Financial Corporation: I.R.E. Advisors Series 23 Corporation, defendant in the *Purcell* case; I.R.E. Advisors Series 24 Corporation, defendant in the *Smith* case; and I.R.E. Advisors Series 21 Corporation, defendant in the *Chelling* case.

American Broadcasting Companies, Inc. and William H. Willson, the petitioners here, applied for intervention in the district court.

Rule 29.6 Statement

American Broadcasting Companies, Inc. is a wholly owned subsidiary of ABC Holding Company, Inc., a wholly owned subsidiary of Capital Cities/ABC, Inc., which, in turn, is a wholly owned subsidiary of The Walt Disney Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case, entered on June 25, 1996.

OPINIONS BELOW

The opinion of the court of appeals is reported at 85 F.3d 1508 and is reprinted in the Appendix hereto at 1a-12a. The district court order incorporating its "Final Judgment Approving Settlement and Order of Dismissal" is unreported and is reprinted in the Appendix hereto as 13a-18a. The district court's orders denying petitioners' motion for intervention are at 19a-22a.

JURISDICTION

The judgment of the court of appeals from which petitioners seek review was entered on June 25, 1996. This petition is timely filed within 90 days of that decision. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1992).[1]

STATUTORY PROVISIONS INVOLVED

The text of Rule 24(a) of the Federal Rules of Civil Procedure ("Intervention of Right") is set forth in the Appendix hereto at 44a.

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[1] Under longstanding precedents of this Court, the provision of 28 U.S.C. § 1254(1) that a writ of certiorari may be granted "upon the petition of any party" does not preclude such a grant to petitioners here. *See Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) ("One who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling.") (citing *International Union, UAW, Local 283* v. *Scofield*, 382 U.S. 205, 208-09 (1965))). The Court has, in fact, frequently granted writs to unsuccessful applicants for intervention in both trial and appeals court proceedings who have sought review of the denial of intervention. *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 493 (1975); *Donaldson* v. *United States*, 400 U.S. 517, 521-22 (1971); *Kaufman* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156, 158 (1952).

STATEMENT OF THE CASE

A. Proceedings Below

In 1989, three class actions (consolidated in what is here referred to as the "*Purcell* action") were filed against defendants BankAtlantic Financial Corporation ("BFC"), Alan B. Levan ("Levan"), and other entities and individuals, on behalf of a group of BFC's and Levan's former limited partners in three real estate public limited partnerships. R. 1-1.[2] In transactions proposed by BFC and Levan, these limited partners' interests had been "exchanged" (over their dissenting votes or non-votes) for 20-year, unsecured, subordinated debentures of BFC, a savings and loan holding company controlled by Levan. *Id.* The complaint alleged that the transactions (known as "rollups") were perpetrated fraudulently in violation of federal securities laws and state law. Plaintiffs sought damages and rescission of the debentures on behalf of the class. *Id.*

In December 1992, the action was tried in the United States District Court for the Southern District of Florida.[3] The critical question in the case was whether the defendants had committed securities fraud by representing in the prospectus and the accompanying transmittal letter that "the managing general partners, the company and Alan B. Levan believe that the exchange is fair to the limited partners" when they knew that it was not. R. 12-345-1597. At the conclusion of the two-week trial, the jury determined that BFC and Levan had in fact committed securities fraud. App. 25a. In response to special interrogatories, the jury found that the rollups proposed by BFC and Levan were unfair to their limited partners and

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[2] Citations to "R.__" are references to the Record on Appeal in the Eleventh Circuit. Citations to "App.__" refer to the Appendix to this Petition.

[3] The district court had jurisdiction over the action pursuant to 28 U.S.C. § 1331 (1992).

that BFC and Levan had falsely stated to them that they believed that the transactions were fair when they actually believed otherwise. *Id.* Eight million dollars in damages was awarded to the plaintiff class. App. 26a.

The district court entered its Final Judgment on the jury's verdict in favor of the class plaintiffs, App. 27a-29a, and subsequently denied the defendants' motions for remittitur and for judgment notwithstanding the verdict or for a new trial, App. 30a-33a. In June, 1993, in an order on the class plaintiffs' motion to amend the judgment to add pre-judgment interest, the district court set out its reasons for denying judgment n.o.v.:

> In this case, a jury has found, in essence, that a certain securities swap of subordinated debentures for limited partnership interests was so fundamentally unfair that Alan Levan, as managing general partner, could not have believed it to be fair when he allowed his statement of fairness to be included in the issuing prospectus. The jury apparently believed that where the Bankatlantic bonds were subordinated and unsecured, where there was no mandatory schedule of interest payments, and where the principal owing was not due for twenty years after issuance, the exchange of those bonds for I.R.E. limited partnership interests was inherently unfair. This Court cannot say that the jury's verdict was irrational or without factual or evidentiary foundation, and has accordingly denied Defendants' motions for judgment as a matter of law and in the alternative for a new trial in prior orders.

App. 37a. The *Purcell* defendants (hereinafter collectively "BFC" or "BFC and Levan") filed a notice of appeal from the judgment and post-trial orders.

At the same time BFC and Levan were defending the *Purcell* action, they were also pursuing a libel and false light action in the same court against petitioners (hereinafter

"ABC"), captioned *Levan* v. *Capital Cities/ABC, Inc.* (the "*Levan* action"). App. 48a. In that suit, BFC and Levan claim that they were defamed by a November 1991 news report broadcast on the ABC News program "20/20" that criticized the same rollup transactions at issue in *Purcell*. *Id.* Seven months after the jury verdict in *Purcell*, a United States Magistrate Judge sitting in the *Levan* case issued a Report and Recommendation that summary judgment be granted to ABC on the ground that the *Purcell* judgment and verdict collaterally estopped BFC and Levan from relitigating the question of whether the rollups were fair and that the substantial truth of the broadcast had thus been established. App. 4a.

Before the district judge presiding in the *Levan* case had ruled on the magistrate's Report, the Eleventh Circuit dismissed the appeal in *Purcell* on the ground that because the district judge in *Purcell* had not yet entered his order disposing of the class plaintiffs' claim for equitable rescission of the 20-year debentures, the district court's Final Judgment for damages was not yet appealable. App. 43a. In March 1994, the *Levan* court stayed the libel suit until the rescission claim in *Purcell* was disposed of, observing that entry of such a final judgment in *Purcell* "would have a binding and preclusive effect in this [the *Levan*] case." App. 59a.

BFC and Levan responded by seeking to erase the jury's verdict and the resulting Final Judgment through a settlement. As summarized by the court of appeals:

> After the magistrate judge recommended summary judgment for ABC in the libel lawsuit, Levan and BFC began working on a settlement with the plaintiffs in the class action case. They reached an agreement in which the defendants would pay the plaintiffs the full amount of the damages that the jury had awarded them, plus interest, in exchange for a stipulated motion to vacate the jury verdict and resulting judgment.

App. 4a (footnote omitted).

On June 6, 1994, having been advised of the parties' contemplated settlement, the *Levan* court entered an order concluding that because, in light of the possible settlement, the judgment "may no longer be 'final,' " the magistrate's recommendation that summary judgment be granted to ABC on BFC's and Levan's libel claims would be rejected. App. 64a. The matter was referred to the magistrate "for further consideration in light of the circumstances in *Purcell*." *Id.*

ABC promptly moved to intervene in *Purcell*, as of right or permissively, for the limited purpose of contesting the effort to obtain a vacatur of the verdict and judgment. The motion was opposed by both the *Purcell* plaintiffs and defendants. The *Purcell* court entered orders, without opinion, denying the motion to intervene. App. 19a-22a. ABC appealed from the orders. App. 5a & n.2.

On July 27, 1994, the *Purcell* parties filed a Stipulation of Settlement with the district court under which BFC and Levan proposed to pay the plaintiff class the full $8 million awarded by the jury, plus interest. App. 4a & n.1.[4] The stipulation incorporated a "[Proposed] Final Judgment Approving Settlement and Order of Dismissal," App. 52a-57a, drafted in its entirety by BFC's counsel, which provided that:

> [T]he December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use

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[4] Because the settlement was made contingent not only on the district court's vacatur of the verdict and judgment but also on a resolution upholding the vacatur of any appeals challenging it, R. 3-433-13, -22, it has not to date been consummated.

> against defendants, its [sic] successors or assigns, by plaintiffs or any third parties.

App. 56a.

The proposed judgment drafted by BFC's counsel further asserted, *inter alia*, that the *Purcell* court had itself "entertained serious doubts as to the merit" of the case, that the appeal of it was "hardly frivolous" and that the court had denied a directed verdict and JNOV despite its "serious reservations about the award and . . . the legal rulings upon which it is based" because it "was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review." App. 53a, 54a. The proposed order did not address or even refer to the conclusions embodied in the district court's June 1993 order, denying judgment n.o.v. because the jury verdict was neither "irrational [n]or without factual or evidentiary foundation."

At a hearing on September 12, 1994, the *Purcell* court approved the settlement and signed a final judgment of vacatur identical in every respect to the proposed judgment written by BFC's counsel. App. 13a-18a. Neither party asserted, nor did the *Purcell* court purport to find, any change in the law or facts between the time the court entered its original judgment and then denied judgment n.o.v. and the time the court vacated the judgment. The only new facts were the magistrate's recommendation in favor of summary judgment in *Levan* and the resulting *Purcell* settlement.[5]

ABC then filed a second notice of appeal from both the denial of its intervention motion and from the stipulated judg-

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[5] On April 17, 1995, the *Levan* magistrate recommended that ABC be denied summary judgment in light of the vacation of the *Purcell* judgment. On July 12, 1996, the trial court in *Levan* adopted the Magistrate's R&R, denying summary judgment on the basis of the vacation of the *Purcell* judgment. Although neither ruling is part of the record on appeal, ABC will lodge them with the Court at its request.

ment vacating the jury verdict and the judgment based on it. App. 5a n.2. The two appeals were consolidated. *Id.*[6]

B. The Decision of the Court of Appeals

In an opinion rendered on June 25, 1996, App. 1a-12a, the Eleventh Circuit acknowledged that "unless vacated, the jury verdict and judgment in the class action will preclude [BFC's and Levan's] libel claim against ABC."[7] App. 11a. Nonetheless, the court affirmed the denial of ABC's motion to intervene in the *Purcell* case and, having done so, declared itself to be without jurisdiction to "reach ABC's argument regarding the propriety of the district court's approval of the settlement agreement." App. 6a.

In finding that ABC was not entitled to intervene as of right, the court rejected the contention that opposing vacatur of a judgment that would be preclusive in another case was an interest sufficient to support intervention under Rule 24(a). App. 9a. The court premised its result on the view that

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[6] The *Purcell* plaintiffs moved to dismiss ABC's appeal on the ground that the court of appeals had no jurisdiction to hear the matter because, they urged, the case was moot and ABC lacked standing to contest the result. The court of appeals denied the motion, since a decision favorable to ABC on the intervention question would bring the merits of the judgment of vacatur before it for review. App. 5a & n.3.

[7] The court thus implicitly accepted ABC's argument that although the Final Judgment entered by the *Purcell* court on the jury verdict was not "final" enough for appeal purposes (because it did not dispose of plaintiffs' claim for equitable rescission of the 20-year bonds), it and the verdict itself were sufficiently final for preclusion purposes. This proposition has been widely accepted by the Courts of Appeals. *See, e.g., John Morrell & Co.* v. *Local Union 304A, United Food and Commercial Workers*, 913 F.2d 544, 563-64 (8th Cir. 1990) (defendants collaterally estopped from relitigating issues determined by jury's verdict on liability even though the damages phase of the prior action was not concluded), *cert. denied*, 500 U.S. 905 (1991); *see generally* 18 Charles A. Wright *et al.*, *Federal Practice and Procedure* § 4434 (1981 & Supp. 1996) (collecting cases).

Eleventh Circuit authority requires an intervenor of right to "be at least a real party in interest in the transaction which is the subject of the proceeding" and to have a "direct, substantial, legally protectable interest in the proceedings." App. 7a, 8a-9a. Noting that ABC "admits it is not a real party in interest as to [the debenture] exchange transactions" underlying the class action, the court found that ABC failed to meet that standard. App. 8a-9a. The court further asserted—without any discussion of this Court's decision in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994)—that ABC's interest in the preclusive effect of the *Purcell* disposition was "too collateral, indirect, and insubstantial to support intervention as of right," and that ABC's intervention "would also run counter to the public policy values that are furthered by permitting parties to settle a case without the interference of interlopers." App. 9a.

Acknowledging the truth of "ABC's assertion that without intervention it will have no way to preserve the preclusive effect of the jury verdict and judgment in the class action," the court stated that "a nonparty is not necessarily entitled to preserve the beneficial effects of a jury verdict and judgment, however much the nonparty may cherish those effects." App. 11a. Without reference to collateral estoppel principles, or to the serious public interests articulated in *U.S. Bancorp* against the vacation of judgments, the court concluded that ABC would have an opportunity in a trial of the libel action to relitigate "in the old-fashioned way" the identical issues that had been determined against BFC and Levan in the *Purcell* action. App. 11a.

REASONS FOR GRANTING THE WRIT

RESOLUTION BY THIS COURT OF WHETHER A THIRD PARTY MAY INTERVENE TO OPPOSE VACATION OF A JUDGMENT THAT WOULD COLLATERALLY ESTOP AN ACTION AGAINST IT BY A SETTLING PARTY AND WHEN SUCH A JUDGMENT MAY BE VACATED IS CRITICAL TO THE IMPLEMENTATION OF THE COURT'S RULING IN *U.S. BANCORP MORTGAGE CO.* v. *BONNER MALL PARTNERSHIP* AND WOULD RESOLVE A SIGNIFICANT CONFLICT AMONG THE CIRCUITS.

This case raises the question of how a recent seminal ruling of this Court can be given meaningful effect when the crabbed rules on intervention that are currently in force in some—but not all—circuits are used to deny party status to the very entities that are intended to be the beneficiaries of the ruling. The case at issue, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994), broadly held that litigated judgments have substantial importance to the federal judicial system as a whole that transcends their value to the litigants. Under *U.S. Bancorp*, parties may freely settle their claims and bind each other in any appropriate way. They are limited, however, in their power to use settlement as a means to expunge judgments from public records and thus to usurp the public benefit of those judgments. As a result, once a judgment is entered it may not become a settlement pawn to be routinely purchased and sold at will by the litigants. Rather, in the absence of "exceptional circumstances"—circumstances that do *not* include the desire of one of the parties to erase disagreeable rulings by manipulating the judicial process—such judgments may be relied upon by the courts and third parties to whatever effect the law allows.

In this case, BFC and Levan were held by a jury to have engaged in civil fraud under federal securities laws. Under routine application of collateral estoppel principles, that determination would—as the court of appeals recognized—have barred them from pursuing a libel case against ABC that turns on the very issue that was resolved by the jury's verdict and the resulting judgment. Nonetheless, the district court held that because ABC could not intervene to oppose the agreed-upon vacatur (in return for the payment, dollar for dollar, of the very judgment entered by the district court), the judgment and the verdict are to be vacated. Thus, the only entity with an interest in seeking to enforce the clear mandate of *U.S. Bancorp* was not even permitted an opportunity to be heard on the issue.

This case thus involves two important and inextricably intertwined issues: the need to enforce a seminal ruling of this Court and the need to resolve a major circuit conflict about the kind of interest required for intervention as of right under Rule 24(a)(2). That the effect of the Eleventh Circuit's restrictive views on intervention is to preclude enforcement of this Court's ruling on the relationship of settlement to outstanding judgments makes this case all the more worthy of this Court's plenary review.

U.S. Bancorp and the Vacatur of Judgments

For a number of years prior to 1994, there was a significant circuit split as to whether federal courts would, on the application of parties who had already tried their cases through judgment, vacate those judgments if the parties requested them to do so as an element of settlement. Some circuits did so routinely. *See, e.g., Federal Data Corp.* v. *SMS Data Products Group, Inc.*, 819 F.2d 277, 279 (Fed. Cir. 1987); *Nestle Co.* v. *Chester's Market, Inc.*, 756 F.2d 280, 282-84 (2d Cir. 1985). Others refused to do so. *See, e.g., Clarendon Ltd.* v. *Nu-West Industries, Inc.*, 936 F.2d 127, 129 (3d Cir. 1991); *In*

re United States, 927 F.2d 626, 627 (D.C. Cir. 1991); *In re Memorial Hospital*, 862 F.2d 1299, 1302-03 (7th Cir. 1988).

Proponents of the former position maintained that in a system of private litigation, parties should be free to—and, indeed, encouraged to—settle and that a request by parties to vacate a judgment as a condition of settlement should routinely be honored. *See Nestle*, *supra*, 756 F.2d at 283 ("the importance of honoring settlements" outweighs the value of the finality of judgments). Proponents of the latter position urged that judicial rulings were themselves presumptively valuable to the public at large and that losing parties who had chosen to litigate through judgment should not be free simply to buy off disagreeable precedents via settlement. *See Memorial Hospital*, *supra*, 862 F.2d at 1303 ("When a clash between genuine adversaries produces a precedent, . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. . . . To the extent an opinion permits the invocation of [collateral estoppel], it may have great value to strangers—a value that one or another party to today's case may try to appropriate in the settlement, but which is not theirs to sell.")[8]

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[8] *See* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loy. L.A. L. Rev. 1033, 1078 (1993) ("When wealthy parties can use their money to turn court judgments around, while parties lacking the cash cannot, the courts may no longer be viewed as neutral public arbiters of justice and law, but as one more institution where the dollar calls the tune. A goddess of justice who wears a blindfold, an aspiration that the law treat rich and poor alike, these ideals are subverted by a rule of law that frankly allows private parties to buy off the judgments of the public courts."); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 593, 631 (1991) ("[T]he effect of vacatur . . . extends beyond judicial waste; it perverts the judicial decision into a negotiable commodity, engendering distortion of, and disrespect for, the role of the courts. . . . If a judicial system in which the rights of the parties are

In 1992, this Court determined to resolve the issue. It granted a writ of certiorari in *Izumi*, *supra*, to decide whether " 'the United States Courts of Appeals [should] routinely vacate district court final judgments at the parties' request when cases are settled while on appeal.' " 510 U.S. at 30. After argument, however, the writ was dismissed as improvidently granted because of the failure of petitioner to seek review of the threshold question of whether petitioner, a third party seeking the benefits of collateral estoppel of the judgment the parties sought to vacate by their settlement, should have been permitted to intervene in the court of appeals to oppose vacation of the judgment. *See Izumi*, *supra*, 510 U.S. at 30-34; *see also id.* at 34-36, 40-41 (dissenting opinion of Justices Stevens and Blackmun).

The following year, this Court rendered its ruling in *U.S. Bancorp*, *supra*. In that decision, the Court concluded that in light of "the benefits that flow to litigants and the public from the resolution of legal questions," parties who settle after the

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likely to depend more on their finances than on legal merit is to be condemned, a system in which wealthy litigants can use the process simply as a nonbinding gambling procedure is equally abhorrent."); Ann M. Ghazarians, Note, *The Impact of Collateral Estoppel on Postjudgment Settlements*, 15 Sw. U. L. Rev. 343, 353 (1985) ("When a party decides to litigate, risking a possible adverse judgment, and loses, that party should not be allowed to avoid the effect of collateral estoppel on the judgment merely by entering into a settlement. That party must now bear the consequences of taking that risk."); Michael W. Loudenslager, Note, *Erasing the Law: The Implications of Settlements Conditioned upon Vacatur or Reversal of Judgments*, 50 Wash. & Lee L. Rev. 1229, 1263 (1993) ("[A]llowing a party to vacate trial court decisions when a party possesses a discernible motive to either shape precedent or avoid the preclusive effects of a decision casts considerable doubt on the legitimacy of the judicial system. Granting . . . vacatur under such circumstances amounts to endorsement of manipulation of the legal process."); William D. Zeller, Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 Yale L.J. 860, 867 (1987) ("Circumventing preclusion by vacating existing judgments threatens the public interests in finality of judgments, judicial economy, legitimacy of the legal system, and consistency.").

entry of judgment have to meet a demanding test before that judgment may be vacated. 115 S. Ct. at 393. Declining to vacate a court of appeals judgment at the request of the petitioner after the case was settled during the pendency of this Court's review, the Court unanimously rejected the notion that a courtroom may properly be used as a place to "roll the dice rather than settle . . . if, but only if, an unfavorable outcome can be washed away by settlement-related vacatur." *Id.*

When litigations are settled "after appeal is filed or certiorari sought," the Court determined, the "extraordinary remedy of vacatur" is appropriate only if the parties seeking it can show "exceptional circumstances." *Id.* at 388-89, 392-93. Those circumstances, the Court emphasized, "do not include the mere fact that the settlement agreement provides for vacatur." *Id.* at 393. Because the question of whether to vacate the judgment in the *U.S. Bancorp* case arose directly in this Court, and because no third party sought to be heard, there was no basis for the Court even to consider the intervention issue that had led to the dismissal of the writ in *Izumi*.

This case presents that critical question directly. It is a question that only two members of this Court have addressed to date. In their dissenting opinion from the dismissal of the writ in *Izumi*, Justices Stevens and Blackmun concluded that "if vacation should ever be denied because of the potential impact on third party interests, it was error to deny intervention in this case." 510 U.S. at 36.

The same is true here. BFC and Levan were found liable in a class action for securities fraud for falsely representing that a proposal made by them to their limited partners was fair when they knew it was unfair. As to the separate libel suit commenced by BFC and Levan against ABC, the court of appeals acknowledged that "unless vacated, the jury verdict and judgment in the class action will preclude [plaintiffs'] libel claim against ABC." App. 11a. But the court of appeals' decision barring ABC from intervening to oppose the vacation of the judgment muted the only voice that sought to persuade

the district court to abide by the principles that were articulated by this Court in *U.S. Bancorp*.[9]

Thus, the issue of whether intervention should have been permitted is not only important procedurally but has special substantive bite. As occurred here, settling parties frequently seek vacation of judgments that the losers find inconvenient in return for the payment of much or all of those judgments. The very routineness of that practice undoubtedly contributed to this Court's decision to grant a writ of *certiorari* in *Izumi* and to deny vacation of the judgment in *U.S. Bancorp*. If the Eleventh Circuit's ruling on intervention is not reviewed by this Court, vacation will not only occur in this case, but will routinely occur in cases arising in circuits which hold the same restrictive views on intervention. And such vacation will routinely be treated—as it was here—as unreviewable on the merits because the only entity with an interest in opposing the effort of losing defendants to buy off distasteful precedents will not be permitted to be heard.[10]

Here, the court of appeals affirmed the denial of ABC's motion to intervene, notwithstanding the court's acknowledgment that "without intervention" ABC "will have no way to preserve the preclusive effect of the jury verdict and judgment." App. 11a. Without analysis, the Court dismissed the

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[9] That *U.S. Bancorp* itself was decided two months after the *Purcell* verdict and judgment were vacated does not limit its applicability to this case. As the Court itself stated in *U.S. Bancorp*, the decision did not create new law but rather set forth "principles that have always been implicit in our treatment of moot cases." 115 S. Ct. at 391. In addition, it is well established that "a controlling interpretation of federal law . . . must be given full retroactive effect in all cases still open on direct review." *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

[10] It should come as no surprise that counsel who have settled and agreed to seek vacatur of outstanding judgments have sometimes treated *U.S. Bancorp* as an authority to be "conspicuously uncited." *See Stolz* v. *American International Life Assurance Co.*, 922 F. Supp. 435, 435-36 (W.D. Wash. 1996).

views of Justices Stevens and Blackmun as "not binding precedent" and distinguished the Ninth Circuit case relied upon in their opinion dissenting from dismissal of the writ in *Izumi*.[11] App. 8a-9a. Because parties are entitled "to settle a case without the interference of interlopers," the court of appeals said, the decision denying ABC intervention as of right was consistent with "public policy values." App. 9a.

But the proposition that ABC, with victory concededly at hand in the libel suit against it if the securities fraud judgment against BFC and Levan were not vacated, is an "interloper" because it is for the parties alone to determine, as part of a stipulated settlement, whether a judgment should be vacated, is precisely what *U.S. Bancorp* rejects. The desire of parties to settle after the entry of judgment in return for the vacation of a judgment, this Court held, will *not* in the ordinary course be controlling as against the benefits to society of already-litigated judgments. If intervention is not permitted, however, no one will be heard to seek to give meaning to this Court's ruling in *U.S. Bancorp*.

The Division Among the Circuits

The failure of the Eleventh Circuit even to touch on the implications of *U.S. Bancorp* in considering the intervention issue in this case was bottomed on its extremely restrictive reading of Federal Rule of Civil Procedure 24(a)(2)'s requirement that an intervenor of right have "an interest relating to the property or transaction which is the subject of the action."[12] According to the court, the "interest" required by

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[11] That case was *National Union Fire Insurance Co.* v. *Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989), in which third parties intervened at both the district court and court of appeals levels in order to preserve the preclusive effect of a judgment which the settling parties proposed be vacated. *See Izumi, supra*, 510 U.S. at 36 n.4.

[12] The text of Rule 24(a) is set out in the Appendix hereto at 44a. Subsection (a)(2) requires the grant of intervention as of right when

that subsection is a "direct, substantial, legally protectable interest in the proceedings," something amounting to the status of "at least a real party in interest in the transaction which is the subject of the proceeding." App. 7a.[13] Similarly restrictive views have been articulated by Courts of Appeals for the Third, Fifth and Eighth Circuits. *See, e.g., Mountain Top Condominium Ass'n* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) (proposed intervenors must be "real parties in interest"); *Piambino* v. *Bailey*, 610 F.2d 1306, 1321 (5th Cir.) (the "real party in interest" requirement

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the motion is "timely," the "applicant claims an interest relating to the property or transaction which is the subject of the action," the claimed interest is not already "adequately represented by existing parties," and "the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." The court of appeals here raised no issue with respect to any element of Rule 24(a)(2) other than the "interest" requirement.

Prior to 1966, Rule 24 required an intervenor as of right to show that, in its absence, it would be adversely affected by the distribution or disposition of property involved in the action and would be "bound by the judgment." *See* Adv. Comm. Notes to 1966 Amendment. This formulation of the Rule was, the amendment drafters noted, "unduly restricted." Under the new Rule, they explained, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of." *Id.* There is surely no doubt that here ABC is "substantially affected" by the loss of the preclusive impact of the *Purcell* verdict and judgment.

[13] The Eleventh and Fifth Circuits have drawn a parallel between the interest needed to support intervention under Rule 24(a)(2) and that needed to bring the underlying action under Rule 17(a). Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 Ariz. St. L.J. 853, 916 & n.226 (1989) (collecting cases). Both jurisdictions also tie Rule 24 to Rule 19. *See Moore* v. *Comfed Savings Bank*, 908 F.2d 834, 839 n.1 (11th Cir. 1990) ("[T]he standard for intervention as of right is the same as that of required joinder."); *Martin* v. *Travelers Indemnity Co.*, 450 F.2d 542, 554 (5th Cir. 1971) ("The considerations of judicial efficiency which underlie Rule 19 must also inspire our interpretations of Rule 24.").

applies to intervenors as well as plaintiffs), *cert. denied*, 449 U.S. 1011 (1980); *Solien* v. *Misc. Drivers and Helpers Union, Local No. 610*, 440 F.2d 124, 132 (8th Cir.) ("[i]ntervention as of right presupposes that the applicant has a right to maintain a claim for the relief sought" in the underlying action), *cert. denied*, 403 U.S. 905 (1971).

These views conflict directly with those of the D.C. and Ninth Circuits, which have explicitly rejected the proposition that Rule 24(a) requires "a specific legal or equitable interest" in the underlying property or transaction. *See, e.g., County of Fresno* v. *Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *Nuesse* v. *Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). These courts regard the "interest" requirement to be, in the words of Judge Levanthal in *Nuesse*, "primarily a practical guide to disposing of lawsuits by involving as many concerned persons as is compatible with efficiency and due process." 385 F.2d at 700. *See also Smuck* v. *Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (*en banc*). The Second Circuit, too, has espoused a far more flexible application of Rule 24(a) than the Eleventh Circuit, noting that the amendments made to the Rule in 1966

> focused on abandoning formalistic restrictions in favor of "practical considerations" to allow courts to reach pragmatic solutions to intervention problems. . . . As amended, Rule 24(a)(2) is a nontechnical directive to courts that provides the flexibility necessary "to cover the multitude of possible intervention situations" . . . and that requires consideration of all the competing and relevant interests raised by an application for intervention . . . .

United States v. *Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (citations omitted). *See generally Conservation Law Foundation, Inc.* v. *Mosbacher*, 966 F.2d 39, 41-42 (1st Cir. 1992) (analyzing split on the meaning of Rule 24(a)(2)'s interest requirement as dividing the Second,

Sixth, Tenth and D.C. Circuits, on the one hand, and the Fifth, Seventh, Eleventh and Federal Circuits on the other).[14]

This Court has spoken twice to the issue of the interest required for intervention as of right but has not definitively resolved questions such as those at issue here. In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the Court broadly construed the term "interest," allowing intervenors to contest the terms of an antitrust settlement where both private and public interests were assertedly threatened by the settlement. *Id.* at 134-36. In *Donaldson* v. *United States*, 400 U.S. 517 (1971), in the course of rejecting a taxpayer's bid to intervene in an IRS summary proceeding, this Court stated that the interest contemplated by Rule 24(a)(2) "is obviously . . . a significantly protectable interest." *Id.* at 531. A number of lower courts have noted, however, that these cases do not provide authoritative guidance with respect to the nature of the interest needed for intervention as of right. *See, e.g., Meyer Goldberg, Inc.* v. *Goldberg*, 717 F.2d 290, 292 (6th Cir. 1983); *Meridian Homes Corp.* v. *Nicholas W. Prassas & Co.*, 683 F.2d 201, 203-04

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[14] The stark conflict between the circuits has been frequently remarked upon by scholars. *See* 7C Charles A. Wright *et al.*, *Federal Practice and Procedure*, § 1908 at 263 (2d ed. 1986 & Supp. 1996) (there has been "[no] clear definition, either from the Supreme Court or from the lower courts, of the nature of the 'interest' " needed by an intervenor of right); Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 434 (1991) ("Circuit and district judges have exhibited great difficulty defining interest with sufficient clarity, despite the thousands of opportunities available to them."); *see also* Greenbaum, *supra*, 21 Ariz. St. L.J. at 936-37 & nn.331-338 (detailing the confusion about whether some circuits have aligned themselves on the "narrow" or the "liberal" side of the split and noting that the labels which courts typically use to describe the interest required by Rule 24(a)(2) have resulted in "a linguistic morass"); Susan Bandes, *The Idea of a Case*, 42 Stan. L. Rev. 227, 251 & nn.151-57 (1990) (identifying six distinct judicial formulations of the interest test); Tobias, *supra*, 1991 Wis. L. Rev. at 434 n.132 (concluding that Professor Bandes "may have underestimated the number of formulations and the degree of inconsistency").

(7th Cir. 1982); *Blake* v. *Pallan*, 554 F.2d 947, 952 (9th Cir. 1977).

Some courts have taken the position that the "significantly protectable" language in *Donaldson* was intended to limit the apparent liberality of *Cascade*. *See, e.g., American National Bank & Trust Co.* v. *City of Chicago*, 865 F.2d 144, 146 & n.2 (7th Cir. 1989); *New Orleans Public Service, Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 466 n.28 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984). Others differ, resting their more expansive construction of the interest requirement at least in part on *Cascade*. *See, e.g., Feller* v. *Brock*, 802 F.2d 722, 730 (4th Cir. 1986) (citing *Cascade* for the proposition that impact on ability to compete economically is sufficient to warrant intervention of right); *Natural Resources Defense Council, Inc.* v. *United States Nuclear Energy Comm'n*, 578 F.2d 1341, 1344 (10th Cir. 1978) (stating that *Cascade* "held that the interest claimed by the applicant in intervention did not have to be a direct interest in the property or transaction at issue provided it was an interest that would be impaired by the outcome"); *Blake*, *supra*, 554 F.2d at 952 (*Cascade* "rejected the notion that Rule 24(a)(2) requires [that the intervenor have] 'a specific legal or equitable interest' ").

If anything, the circuit division as to when a party has an interest sufficient to permit intervention as of right is exacerbated when the asserted interest lies in the perpetuation of a judgment or decision. In this case, the Eleventh Circuit squarely held that even the concededly dispositive collateral estoppel impact of a judgment does not suffice to permit intervention to protect that interest. That ruling is not only at odds with the Ninth Circuit's decision allowing intervention for just such a purpose in *National Union*, *supra*, a case referred to in the dissenting opinion of Justices Stevens and Blackmun in *Izumi*, but with rulings in other circuits permitting intervention in cases in which third parties professed concern about the potential *stare decisis* impact upon their own cases. *See Natural Resources Defense Council*, *supra*,

578 F.2d at 1345 (reversing denial of intervention to avoid *stare decisis* impact of case: "[t]he court may consider any significant legal effect on the applicant's interest and it is not restricted to a rigid res judicata test"); *Brody* v. *Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992) (same); *Feller*, *supra*, 802 F.2d at 730 (permitting intervention when *stare decisis* effect of litigation would substantially impair ability of proposed intervenor to rely on outstanding injunction); *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) ("We join other circuits in holding that the possibility of adverse stare decisis effects provides intervenors with sufficient interest to join in an action."). At the very least, the substantiality of a third party's interest in protecting the preclusive effect of a judgment surely equals a third party's interest in the *stare decisis* effect of a decision.[15]

The Rejection of U.S. Bancorp

That the court of appeals here was unpersuaded by the significance of ABC's interests—despite its acknowledgment that, but for the vacatur, the *Purcell* judgment would estop the *Levan* action entirely—reflects more than a crabbed approach to intervention which conflicts with rulings in other circuits. It displays, as well, a rejection of the core principles articulated in *U.S. Bancorp* itself.[16]

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[15] *See, e.g., Nuesse, supra*, 385 F.2d at 702 (finding sufficient potential impairment to justify intervention as of right even though movant "would not be precluded by res judicata from relitigating this question if an unfavorable answer is rendered in his absence"; even under the considerably more restrictive pre-1966 Rule 24, "the opportunity to raise the same issue in another forum was no bar to intervention as of right").

[16] It is also wholly inconsistent with the principles articulated in this Court's landmark ruling in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). If, as this Court ruled, the offensive use of non-mutual collateral estoppel is to be encouraged, the Eleventh Circuit's ruling here deprives the very parties benefitted by *Parklane* of an opportunity to urge

In *U.S. Bancorp*, this Court unanimously held that, under "principles that have always been implicit in our treatment of moot cases," courts may not routinely vacate decisions pursuant to settlement agreements between the parties. 115 S. Ct. at 391. Labeling vacatur an "extraordinary remedy" that may be granted pursuant to settlement only in "exceptional circumstances," *id.* at 392-93, this Court firmly and unequivocally rejected the very concept that the court of appeals articulated here: that the value of settlement necessarily outweighs the interest of "interlopers" such as ABC, and of society as a whole, in the preservation of already-litigated judgments.

Where a case becomes moot as a result of settlement or other voluntary act of the losing party, the Court continued, "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *Id.* at 392. "As always when federal courts contemplate equitable relief," the Court explained,

> our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. __, __, 114 S. Ct. 425, 428, 126 L. Ed.2d 396 (1993) (STEVENS, J., dissenting [to dismissal of certiorari]). Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral

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that otherwise preclusive verdicts and judgments should not simply be erased when the litigants in the first action are faced with the unpleasant collateral consequences of those verdicts and judgments.

> attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.

Id. at 392. The Court further rejected the view, expressed in some opinions, that "since district-court judgments are subject to review as of right," vacatur motions directed at those judgments "should be more freely granted." *Id.* at 393.

The choice presented to this Court in *U.S. Bancorp* was clear: to protect the public judgments of the courts from litigants who wish to buy and sell them as an element of settlement or to permit litigants to decide for themselves whether judgments in their cases will survive settlement. Choosing the former course, this Court ruled that judgments should not be vacated absent "exceptional circumstances" and made explicit "that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur—which neither diminishes the voluntariness of abandonment of review nor alters any of the policy considerations we have discussed." *Id.*

In this case, it is undisputed that the *Purcell* jury found BFC and Levan liable for securities fraud and awarded the plaintiff class $8 million in damages; that the *Purcell* court entered judgment on that verdict and denied BFC's and Levan's Rule 50 and Rule 59 motions for judgment n.o.v. or a new trial because it found the verdict to be sufficiently supported by the evidence; that BFC and Levan offered the plaintiff class the entire $8 million awarded by the jury in a settlement on condition that the class agree to a stipulated judgment erasing the prior verdict and judgment and declaring that the verdict and judgment would have no preclusive effect; that BFC and Levan could have but chose not to finalize their case for appeal; that no law and no fact changed between the date the prior judgment was entered and the date the vacatur occurred (except the magistrate's recommendation in *Levan* that summary judgment be granted and the *Purcell*

parties' own decision to settle); and that through the stipulation of settlement and the consent judgment embodying it, BFC and Levan "*voluntarily* forfeited [their] legal remedy by the ordinary processes of appeal." *U.S. Bancorp*, 115 S. Ct. at 392 (emphasis added). These facts are the very opposite of "exceptional circumstances." They amount, in the end, to nothing more or less than that "the settlement agreement provides for vacatur"—precisely what this Court concluded does *not* constitute "exceptional circumstances." *Id.* at 393.[17]

Despite the clarity of this Court's rationale in *U.S. Bancorp*, that rationale was discarded by the Eleventh Circuit.[18] Both in its failure even to address *U.S. Bancorp* and in its decision to deny "interlopers" such as ABC the opportunity to intervene to seek to preserve an outstanding judgment, the court of appeals subordinated the value of assuring that judgments are not bought and sold by litigants to that of encouraging settlement. This is the very calculus which *U.S. Bancorp* considered and rejected.[19]

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[17] As this Court stated in *U.S. Bancorp*, a district court may vacate a judgment even after settlement pursuant to Federal Rule of Civil Procedure 60(b). 115 S. Ct. at 393. The parties below did not pursue their vacatur through a Rule 60(b) motion. Nor could they have, as they are unable to demonstrate a ground for relief under any of the provisions of that Rule. Even the broad "catch-all" of subsection 60(b)(6) of the Rule—allowing invocation of "any other reason justifying relief from the operation of the judgment"—requires that the moving party show "exceptional circumstances," *Pioneer Investment Services Co.* v. *Brunswick Assocs. Limited Partnership*, 507 U.S. 380, 393 (1993), precisely what *U.S. Bancorp* ruled is the necessary predicate for vacatur of a voluntarily mooted judgment.

[18] Yet, as Justice Scalia recently emphasized, this Court expects lower courts to adhere not only to the results but also to the " '*rationale* upon which the Court based the results of its earlier decisions.' " *United States* v. *Virginia*, 64 U.S.L.W. 4638, 4661 (U.S. June 26, 1996) (Scalia, J., dissenting) (emphasis original) (quoting *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1128-29 (1996)).

[19] The Eleventh Circuit's resistance to enforcing this Court's ruling in *U.S. Bancorp* may be shared by the First Circuit as well. In *Motta*

Only by making plain that third parties with the kind of direct interest in the preclusive impact of a judgment which ABC has here—and which Izumi had in the *Izumi* case—can *U.S. Bancorp ever* be enforced. This case thus presents an important opportunity for this Court to assure that the principles of *U.S. Bancorp* will not be ignored, to resolve a continuing conflict among the circuits, and to repudiate as fundamentally inconsistent with the purport of Rule 24 the restrictive approach to intervention adopted by the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 23, 1996

Respectfully submitted,

Floyd Abrams
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record
for Petitioners

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v. *District Director of INS*, 61 F.3d 117 (1st Cir. 1995), the court of appeals vacated a district court judgment that was mooted by settlement while appeal was pending, finding that "exceptional circumstances" existed under *U.S. Bancorp* because (1) the settlement effort had been initiated by the appeals court; (2) the INS, the loser below, was a "repeat player" that had an interest in eradicating the adverse precedent; (3) the alien who won below was relieved of the risks of appeal; and (4) the INS would not settle without the vacatur. *Id.* at 118-19. The *Motta* analysis appears directly contrary to this Court's ruling in *U.S. Bancorp*.

Of Counsel:

Susan Buckley
Anne B. Carroll
Cahill Gordon & Reindel
New York, New York

Raymond V. Miller
Kaufman Miller Dickstein
& Grunspan, P.A.
Miami, Florida

Alan N. Braverman
Stephanie S. Abrutyn
American Broadcasting Companies, Inc.
New York, New York